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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

**JOHN V. GILLESPIE, SHERIFF,
PETITIONER,**

v.

**DIANE HELEN MANNES,
RESPONDENT.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a trial judge's dismissal of murder charges after a hung jury pursuant to a statute which authorizes dismissal "in furtherance of justice" constitute an implied acquittal which prohibits retrial under the federal double jeopardy clause?

2. Should a dismissal of murder charges after a hung jury be construed as an acquittal when the judge dismissing the charges had no legal authority to acquit?

3. Should a federal court on habeas corpus give deference to the state courts' interpretation of a state court order, i.e., that the dismissal order was not a finding of insufficiency of the evidence that would bar retrial?

TOPICAL INDEX

QUESTIONS PRESENTED i

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

A. Statement of facts 2

B. The first information 2

C. The jury trial 3

D. Murder charges dismissed 4

E. Refiled complaint 4

F. State court writs denied 4

G. The second information 5

H. Federal habeas petition 5

I. Appeal to Ninth Circuit 6

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. The dismissal of charges following a hung jury did not constitute an implied acquittal prohibiting retrial under the Double Jeopardy Clause 7

A. Retrial is permitted where there is no finding of insufficient evidence as a matter of law 7

B. The denial of the acquittal motions preclude habeas corpus relief 12

C. The intent of the trial judge should have been considered 13

II. The dismissal order should not be construed as an acquittal because the trial judge had no legal authority to acquit after a hung jury 15

III. Federal habeas courts should give deference to state courts' interpretations 17

CONCLUSION 20

APPENDICES

A. United States Court of Appeals: Opinion
B. Ventura County Superior Court: Partial Transcript of November 7, 1989
C. Ventura County Superior Court: Partial Transcript of November 9, 1989
D. Ventura County Superior Court: Order on Request to Reset Murder Charges for Trial
E. Ventura County Municipal Court: Partial Transcript of January 10, 1990

(Appendices continued)

F. Ventura County Superior Court: Minute Order - Writ Denied

G. California Court of Appeal: Petition for Writ of Mandate Denied

H. California Supreme Court: Petition for Review Denied

I. United States District Court: Report and Recommendation of United States Magistrate Judge

J. United States District Court: Final Report and Recommendation of United States Magistrate Judge

K. United States District Court: Order Approving Magistrate Judge's Report

L. United States District Court: Judgment

M. United States District Court: Order on Motion to Amend Judgment

N. Constitutional and Statutory Provisions

TABLE OF AUTHORITIES

Cases — Page(s)

Austad v. Risley 13
(9th Cir. 1985)
761 F.2d 1348, 1355, fn. 4
cert. denied, 474 U.S. 856

Burks v. United States 8,10
(1978) 437 U.S. 1

Coleman v. Thompson 17
(1991) 501 U.S. _____
115 L.Ed.2d 640, 654, 656
111 S.Ct. 2546, 2552, 2554
reh. denied, 115 L.Ed.2d 1109,
112 S.Ct. 27

Duckworth v. Eagan 17
(1989) 492 U.S. 195, 210 (O'Connor, J., concurring)

Green v. United States 7
(1957) 355 U.S. 184, 188

Greene v. Massey 19
(1978) 437 U.S. 19

Greene v. Massey 19,20
(5th Cir. 1983)
706 F.2d 548, cert. denied,
464 U.S. 1046, reh. denied, 465 U.S. 1074

Harris v. Reed 17
(1989) 489 U.S. 255, 282
(Kennedy, J., dissenting)

Hudson v. Louisiana 7,8,13
(1981) 450 U.S. 40

Lee v. United States 13
(1977) 432 U.S. 23

Lewis v. Jeffers 19
(1990) 497 U.S. ___
111 L. Ed.2d 606, 622-624
110 S.Ct. 3092, 3102-3104

Mannes v. Gillespie 1
(9th Cir. 1992) _____ F.2d _____
(Slip Op., p. 6877)

People v. Blalock 8
(1960) 53 Cal.2d 798, 802
3 Cal.Rptr. 137
349 P.2d 953

People v. James 10,11
(1980) 102 Cal.App.3d 108
162 Cal.Rptr. 263

People v. Lo Cigno 7
(1965) 237 Cal.App.2d 470, 474
46 Cal.Rptr. 918

People v. Smith 11
(1983) 33 Cal.3d 596, 601, fn. 3
189 Cal.Rptr. 862
659 P.2d 1152

People v. Superior Court (Howard) 8,16
(1968) 69 Cal.2d 491, 505
72 Cal.Rptr. 330
446 P.2d 138

People v. Superior Court (Jonsson) 16
(1966) 240 Cal.App.2d 90
49 Cal.Rptr. 365

People v. Trevino 12,13
(1985) 39 Cal.3d 667, 695
217 Cal.Rptr. 652
704 P.2d 719

People v. Veitch 9
(1982) 128 Cal.App.3d 460, 466
180 Cal.Rptr. 412

Tibbs v. Florida 10,20
(1982) 457 U.S. 31

Turner v. Compoy 18
(9th Cir. 1987)
827 F.2d 526, 529
cert. denied, 489 U.S. 1059
reh. denied, 490 U.S. 1031

United States v. Martin Linen Supply Co. 15,16
(1977) 430 U.S. 564

United States v. Sanford 16
(1976) 429 U.S. 14

United States v. Weinstein 14,15,16
(2nd Cir. 1971)
452 F.2d 704
cert. denied, 406 U.S. 917

Wright v. West 17,18
(1992) 505 U.S. ____
120 L.Ed.2d 225
112 S.Ct. 2482

Constitution

U.S. Constitution, 5th Amendment 2,15

Statutes

California Penal Code § 187(a) 3

California Penal Code § 1023 11

California Penal Code § 1118.1 2,3,9,12,13,15,18,19

California Penal Code § 1141 8

California Penal Code § 1385 2,4,8,10,11,16,18,19

California Penal Code § 1387 7,11

California Vehicle Code § 23153(a) 3

California Vehicle Code § 23153(b) 3

California Vehicle Code § 23182 3

California Vehicle Code § 23206.1 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2253 6

28 U.S.C. § 2254 5

28 U.S.C. § 2254(d) 13

Rules

Federal Rule of Criminal Procedure 29 2,14,15,16

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

The District Attorney of the County of Ventura, on behalf of petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on June 22, 1992. The opinion affirmed the issuance of a writ of habeas corpus by the district court which prohibits retrial of respondent for murder.

OPINION BELOW

The only published opinion in this case is *Mannes v. Gillespie* (9th Cir. 1992) ____F.2d _____ (Slip Op., p. 6877). It is reproduced as Appendix A hereto.

JURISDICTION

The opinion of the Court of Appeals was issued on June 22, 1992. The jurisdiction of the Supreme Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution, sections 1118.1 and 1385 of the California Penal Code, and rule 29 of the Federal Rules of Criminal Procedure are reproduced in Appendix N hereto.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The charges arise from a fatal collision that occurred on March 31, 1989. Respondent, Diane Helen Mannes, drove a Ford Bronco into five pedestrians on the northbound shoulder of Highway 101 at the Conejo grade, killing three of the pedestrians and injuring the other two. Respondent's blood-alcohol level two hours after the collision was .20% by weight.

Respondent had been arrested the night before the collision for driving under the influence of alcohol. Following that arrest, her fiance picked her up from jail, told her during a conversation of two and one-half hours about the dangers of driving under the influence, and elicited a promise that she not do it again.

B. THE FIRST INFORMATION

Respondent was charged in an information filed on June 29, 1989, in the Superior Court of the State of California, County of Ventura. She

was charged in Counts 1, 2 and 3 with murder (California Penal Code section 187(a)) of Darrin Scott Mullins, Joshua Daniel Oxenreider, and Jacob Eugene Boyd, respectively, while driving under the influence of alcohol. She was charged in Count 4 with driving under the influence causing injury to Jeffrey Botens (California Vehicle Code section 23153(a)). She was charged in Count 5 with driving with a blood-alcohol level of .10% or more causing injury to Jeffrey Botens (California Vehicle Code section 23153(b)). Sentencing enhancements were alleged as to Counts 4 and 5 for multiple victims, the additional alleged victim being Jeremy Lee Boyd (California Vehicle Code section 23182). An enhancement was alleged as to Count 5 for having a blood-alcohol level of .20% or more (California Vehicle code section 23206.1). All of the counts were alleged to have been committed on or about March 31, 1989.

C. THE JURY TRIAL

During the trial, respondent made two motions for acquittal pursuant to California Penal Code section 1118.1. The first motion was on November 7, 1989, after the prosecution presented its case-in-chief. The second motion was on November 9, 1989, after all the evidence had been presented and both sides had rested. The trial judge found that there was sufficient evidence to sustain a jury verdict of guilty and denied both motions. (These rulings are reproduced in Appendices B and C.)

On November 17, 1989, the jury found respondent guilty of Counts 4 and 5 (driving under the influence causing injury and driving with a blood-alcohol level over .10% causing injury) and found true the multiple victim allegation. The jury was deadlocked on the murder counts (Counts 1, 2, and 3) with seven of the twelve jurors voting guilty. The court declared a mistrial as to the murder counts and discharged the jury.

On February 2, 1990, the superior court sentenced respondent to four years in state prison for the Vehicle Code violations (Counts 4 and

5) less credit for time served of 297 actual days and 149 days conduct credit.

D. MURDER CHARGES DISMISSED

Respondent filed a Motion to Dismiss by the Court in Furtherance of Justice, Pursuant to Penal Code § 1385. The motion was granted and the murder charges dismissed pursuant to Penal Code section 1385 on December 1, 1989. The court issued a written order explaining its reasons (attached hereto as Appendix D). In that order, the court recognized that the district attorney could refile the murder charges and retry respondent.

E. REFILED COMPLAINT

On December 1, 1989, the district attorney refiled the murder charges in municipal court in a felony complaint. Respondent filed a motion to dismiss based on double jeopardy grounds. Both sides filed points and authorities discussing the interpretation of the dismissal order under both state and federal law. On January 10, 1990, after oral argument by both sides, the municipal court denied respondent's motion to dismiss. (Appendix E.) The court found that the trial judge did not make a finding as a matter of law that there was insufficient evidence. On June 13, 1990, the preliminary hearing was held in municipal court, and respondent was held to answer for three counts of murder.

F. STATE COURT WRITS DENIED

On February 16, 1990, respondent filed a petition for writ of mandate in superior court challenging the refusal of the municipal court to dismiss the refiled murder charges. On March 16, 1990, the petition was denied. (Appendix F.) Respondent then filed a petition for writ of

mandate in the Court of Appeal of the State of California, Second Appellate District, Division 6, which was denied on March 29, 1990. (Appendix G.) Respondent then filed a petition for writ of mandate in the Supreme Court of California. The state Supreme Court treated the petition as a petition for review, and denied it on May 23, 1990. (Appendix H.)

G. THE SECOND INFORMATION

The second Information was filed in superior court on June 21, 1990, alleging three counts of murder. On June 21, 1990, respondent entered pleas of not guilty and once in jeopardy. On June 27, 1990, the superior court struck the plea of once in jeopardy.

H. FEDERAL HABEAS PETITION

Respondent filed a petition for writ of habeas corpus in the United States District Court, Central District of California. The District Court had subject matter jurisdiction to issue a writ of habeas corpus for a person in state custody pursuant to 28 U.S.C. section 2254. Over opposition of the district attorney, the Honorable A. Wallace Tashima, United States District Judge, ordered all state court proceedings stayed pending resolution of the writ. The Honorable Volney V. Brown, Jr., United States Magistrate Judge, issued his Report and Recommendation recommending that a petition for writ of habeas corpus be issued to prohibit retrial of defendant for murder. (Appendix I.) The district attorney filed objections to the report and recommendation. The Magistrate Judge then issued a Final Report affirming his earlier recommendation. (Appendix J.) The District Court Judge approved the report and issued a writ of habeas corpus "forever prohibiting the retrial of petitioner for the murder of Darrin Scott Mullins, Joshua Daniel Oxenreider and/or Jacob Eugene Boyd." (Appendices K and L.)

The district attorney filed a notice of motion to amend judgment and for rehearing. The district court denied the motions without hearing. (Appendix M.)

I. APPEAL TO NINTH CIRCUIT

The district attorney appealed to the United States Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. section 2253. On March 5, 1991, Judge Tashima granted the district attorney's application to stay the state court proceedings pending appeal.

On June 22, 1992, the Court of Appeals issued its opinion, certified for publication, affirming the District Court's issuance of the writ of habeas corpus. (Appendix A.) The court rejected our argument that the District Court should have abstained from interfering with the pending state court proceedings. On the merits, the court treated the trial judge's dismissal as an acquittal which, under the Double Jeopardy Clause, barred retrial. The court rejected the municipal court's interpretation that the dismissal ruling was not "a finding as a matter of law that there was insufficient evidence." (Slip op., p. 6886.) Although the trial court had specifically ruled that the charges could be refiled and the defendant retried, the Court of Appeals ruled that "whether the Double Jeopardy Clause bars a prosecution is not determined by the characterization of a dismissal under state law . . ." (Slip op., p. 6888.) Finally, the court discounted the trial court's denial of the two acquittal motions by speculating that the trial judge must have reconsidered these rulings. (Slip op., pp. 6887-6888, fn. 5.)

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

THE DISMISSAL OF CHARGES FOLLOWING A HUNG JURY DID NOT CONSTITUTE AN IMPLIED ACQUITTAL PROHIBITING RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSE

A. RETRIAL IS PERMITTED WHERE THERE IS NO FINDING OF INSUFFICIENT EVIDENCE AS A MATTER OF LAW

Retrials are permitted upon "failure of a jury to agree on a verdict." *Green v. United States* (1957) 355 U.S. 184, 188. In *People v. Lo Cigno* (1965) 237 Cal.App.2d 470, 474, 46 Cal.Rptr. 918, the court held that the policy against retrials described in *Green* "does not apply to prevent a retrial of a defendant . . . after a mistrial has been declared on account of the inability of the jury to reach a verdict. Defendant is no worse off for having been tried upon a second indictment rather than retried upon the first." Citing California Penal Code section 1387, the court noted, "It is well established that the dismissal of a felony prosecution does not operate as a bar to a new prosecution for the same offense." *Id.* at p. 472.

California Penal Code section 1387 permits a dismissed felony charge to be refiled. Case law explains that a dismissal will be considered to be an implied acquittal barring retrial only if the court concludes that the evidence was insufficient *as a matter of law.*

In *Hudson v. Louisiana* (1981) 450 U.S. 40, the trial court granted a new trial after the jury returned a verdict of guilty. In concluding that retrial was prohibited, the Supreme Court relied upon the fact that "[t]he trial judge granted the new trial because the State had failed to prove its case as a matter of law, not merely because he, as a '13th juror,' would have decided it differently . . .." *Id.* at p. 44. The court in *Hudson* distinguished the situation in which a new trial is granted by a judge who

entertained personal doubts about the verdict employing a "13th juror" standard. *Id.* at p. 45 and n. 5.

Similarly, in *Burks v. United States* (1978) 437 U.S. 1, 17, the court held that a finding that the evidence is legally insufficient is based on the standard of review employed on appeal, i.e., whether there is "substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." Appellate reversal is "confined to cases where the prosecution's failure is clear." *Ibid.* That is *not* this case!

In the present case, the trial court dismissed the information pursuant to California Penal Code section 1385, which authorizes dismissal "in furtherance of justice." This broad discretionary standard is similar to the "13th juror" standard discussed in *Hudson.*

There is little authority in California to explain the standard to be employed in deciding after a hung jury whether the case should be reset for trial or dismissed. California Penal Code section 1141 provides only that "the cause may be again tried." *People v. Blalock* (1960) 53 Cal.2d 798, 802, 3 Cal.Rptr. 137, 349 P.2d 953, explains only that "the trial court shall determine in the cases specified whether or not the defendant shall be tried again." *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 505, 72 Cal.Rptr. 330, 446 P.2d 138, discusses the standard to be employed in a dismissal in analogous circumstances:

> A determination whether to dismiss in the interests of justice after a verdict involves a balancing of many factors, including the weighing of the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed upon the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented upon a retrial.

Thus, the decision to dismiss the present case involved balancing a number of factors, not limited to whether the trial judge felt that the case had been or could be proven.

In *People v. Veitch* (1982) 128 Cal.App.3d 460, 466, 180 Cal.Rptr. 412, the court contrasted an acquittal with a ruling employing a broader discretionary standard. The court held that an acquittal by the trial judge under California Penal Code section 1118.1 during the course of a jury trial bars any other prosecution for the same offense. The court noted:

> The test to be applied by a trial court in deciding a section 1118.1 motion is the "same test applied by an appellate court in reviewing a conviction: whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged."

Ibid.

In contrast, the court held that in ruling on a new trial motion, the trial court "is under the duty to give the defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict. [Citation.] If the trial court grants a new trial under this motion, the decision is not an acquittal and is not a bar to retrial . . ." *Id.* at p. 467. Retrial is barred only where "'the State has failed as a matter of law to prove its case,' not when a 'new trial [is] ordered by a trial judge acting as a "13th juror".'" *Ibid.*

In the present case, the trial court had considerable discretion to weigh the evidence in ruling on the motion to dismiss. The court could exercise at least as much independent judgment as it would have in a new trial motion. The court did not find *as a matter of law* that the evidence was insufficient. Thus, retrial should not have been barred under the Double Jeopardy Clause.

The Court of Appeals relies in part upon *Tibbs v. Florida* (1982) 457 U.S. 31. (Slip op., pp. 6886-6887.) *Tibbs* quoted *Burks v. United States*, *supra*, 437 U.S. at p. 16, which explained that "legally insufficient" evidence "means that the government's case was so lacking that it should not have even been *submitted* to the jury." As discussed below, the trial court in the present case made the contrary determination by denying the two motions for acquittal during trial.

The court in *Tibbs* noted, "A deadlocked jury, we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause." 457 U.S. at p. 42. The court continued in footnote 17, "Our decisions also make clear that disagreements among jurors or judges do not themselves create a reasonable doubt of guilt." Here, seven of the jurors voted for guilt.

Tibbs permits retrial when the conviction is reversed because the "interests of justice" require a new trial, rather than because of legal insufficiency of the evidence. *Id.* at pp. 46-47. The dismissal in the present case was pursuant to Penal Code section 1385, subdivision (a), which authorizes dismissal "in furtherance of justice." Because that legal standard is almost identical to the "interests of justice" standard in *Tibbs*, retrial is permitted.

The present case is on all fours with *People v. James* (1980) 102 Cal.App.3d 108, 162 Cal.Rptr. 263. In *James*, the jury found the defendant guilty of arson, but deadlocked on a murder charge. The trial court dismissed the murder charge pursuant to California Penal Code section 1385, stating:

> [T]hat in the Court's opinion it would be impossible to get a verdict of either guilty or not guilty because of the legal issues of specific intent, murder felony rule with a general intent crime, and the even split of the psychiatric testimony, the Court feels that it would be impossible to get a verdict in this case . . .

102 Cal.App.3d at p. 110.

The trial court also found that it "would have a reasonable doubt itself if he had to try the case without the jury on the issue of murder, Count 1." *Ibid.*

The prosecution in *James* subsequently refiled the murder count, and the defendant entered a plea of "once in jeopardy." The trial court held that the plea was valid and dismissed the matter pursuant to Penal Code section 1385. In reversing the dismissal, the Court of Appeal observed:

> It is well settled that "a retrial of a count on which the jury fails to agree is not 'another prosecution' within the meaning of Penal Code section 1023, and hence is not barred by the double jeopardy doctrine." [Citations.] . . . Generally, a defendant may be retried until "complete and final disposition is made of, all charges pleaded."

Id. at p. 111.

James' principal contention was that a dismissal under Penal Code section 1385 placed him "once in jeopardy." The court relied upon Penal Code section 1387, holding that the dismissal did not bar further prosecution. "Here the charge was only dismissed once under section 1385 prior to the filing of the present action. Under section 1387 one dismissal is not a bar to further prosecution." *Id.* at p. 113. *James* was disapproved in *People v. Smith* (1983) 33 Cal.3d 596, 601, fn. 3, 189 Cal. Rptr. 862, 659 P.2d 1152, only to the extent that the court in *James* considered the merits before determining whether the prosecution had a right to appeal.

The *James* case is virtually identical to the case at bar. Not only did the jury deadlock on one of the counts, and the trial judge dismiss the count under section 1385, but the trial judge in *James* also stated that in his opinion, it would be impossible for a second jury to return a verdict, and stated that he had a reasonable doubt as to the defendant's guilt. As in *James*, the facts of the present case did not justify an order precluding retrial.

B. THE DENIAL OF THE ACQUITTAL MOTIONS PRECLUDE HABEAS CORPUS RELIEF

The trial judge made two rulings which employed the appellate standard of review, and found the evidence *sufficient* under that standard. The court denied a motion for acquittal under California Penal Code section 1118.1 at the end of the prosecution's case, and again at the end of all of the evidence. By its terms, section 1118.1 requires a judgment of acquittal if "the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

The test in deciding a section 1118.1 motion is "whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." *People v. Trevino* (1985) 39 Cal.3d 667, 695, 217 Cal.Rptr. 652, 704 P.2d 719. In denying the section 1118.1 motions in the present case, the trial court found that the evidence was legally sufficient to sustain a conviction on appeal.

The Court of Appeals attempts to discount the denials of the acquittal motions by suggesting that the trial judge may have reconsidered his rulings. (Slip op., pp. 6887-6888, fn. 5.) But there is nothing in the dismissal order or elsewhere in the record to support a conclusion that the trial judge reconsidered his earlier rulings or believed that they were erroneous. There is no justification for the Court of Appeals' assumption that the trial judge changed his opinion or reversed his rulings sub silentio. Instead, the record demonstrates that the trial judge made subsequent rulings on different legal issues employing the different legal standards which properly apply to each.

In *People v. Trevino*, *supra*, the trial court denied the 1118.1 motions, but granted a new trial based on insufficiency of the evidence. In granting the new trial, the trial court stated that the evidence was "insufficient as a matter of law." *Id.* at p. 694. The California Supreme Court reasoned that if there had been sufficient evidence to support the conviction on appeal (the 1118.1 standard), "then all of the trial court's rulings would be correct, and the reasons given for granting the new trial

could be safely ignored." *Id.* at p. 696. However, if the evidence was insufficient as a matter of law, the 1118.1 motion should have been granted, and retrial was therefore prohibited. *Id.* at pp. 694-699. The court employed the standard of *Hudson v. Louisiana, supra*, i.e., that retrial is barred where "the evidence was insufficient as a matter of law." 39 Cal.3d. at p. 699.

Again, in the present case, the trial court specifically found that the evidence was sufficient as a matter of law in denying the motions pursuant to section 1118.1. These rulings are presumed to be correct and the burden would be on the party seeking habeas corpus relief to establish otherwise. 28 U.S.C. § 2254(d); *Austad v. Risley* (9th Cir. 1985) 761 F.2d 1348, 1355, fn. 4, cert. denied, 474 U.S. 856. Respondent herein has made no showing on habeas corpus that those rulings were incorrect. Because the evidence is sufficient as a matter of law, the comments given by the court regarding the sufficiency of the evidence at the time the case was dismissed can be "safely ignored" as in *People v. Trevino.*

C. THE INTENT OF THE TRIAL JUDGE SHOULD HAVE BEEN CONSIDERED

In making its ruling, the trial court made it clear that it did not intend to acquit respondent and bar retrial. The court noted that "this dismissal does not prevent the refiling of these murder charges — and a new trial."

The court's recognition that retrial would be permitted is significant. In *Lee v. United States* (1977) 432 U.S. 23, the defendant was charged with theft in federal court. A court trial began and the prosecution gave its opening statement. The defense then moved to dismiss the information as deficient on its face for failing to allege knowledge or intent. The court denied the motion, subject to later reconsideration, and heard the evidence in the case. The court then granted the motion on the original grounds, but made it clear that the evidence at trial was sufficient to convict. *Id.* at p. 26. The Supreme

Court held that a second prosecution on a new indictment was not barred by double jeopardy. The court held that the "critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged." *Id.* at p. 30. The court concluded that the dismissal was indistinguishable from a mistrial for jeopardy purposes because there was "little doubt that the court granted the motion to dismiss in this case in contemplation of just such a second prosecution." *Id.* at pp. 30-31.

In *United States v. Weinstein* (2nd Cir. 1971) 452 F.2d 704, cert. denied, 406 U.S. 917, the federal district court judge dismissed the case after a guilty verdict and after entering judgment. The trial judge relied upon his opinion that the testimony was incredible. *Id.* at p. 707. The trial judge stated that "a new trial would not serve any useful purpose because I believe that the government has presented this evidence it now has as forcibly as it could be presented to this jury. I do not believe that a retrial would serve any purpose at all . . ." *Id.* at p. 708.

The Court of Appeals in *Weinstein* held that the dismissal could not be characterized as an acquittal under Federal Rule of Criminal Procedure 29 because it followed entry of judgment, and because "to characterize the judge's order dismissing the indictment as one of acquittal would be to attribute to him a purpose he repeatedly and rightly disclaimed." *Id.* at p. 713. The court recognized:

> Beyond that the judge was entirely correct in acknowledging that he had no "right" to direct acquittal because of disbelief of the prosecution's witness, even though before entering judgment of conviction he had the "power" to do so. F.R.Cr. P. 29(a), which abolished motions for directed verdicts and substituted motions for judgment of acquittal, directs the granting of such motions "if the evidence is insufficient to sustain a conviction . . ."

Ibid.

Weinstein is relevant for three reasons. First, it recognizes that the trial court's opinion of insufficiency of the evidence is an acquittal only if the evidence is insufficient to sustain a conviction on appeal (i.e., insufficient as a matter of law), and not if based on its own weighing of the evidence. In the present case, the court found the evidence sufficient as a matter of law by denying the acquittal motions under Penal Code section 1118.1. Second, *Weinstein* refused to characterize a dismissal as an acquittal where the court disclaimed the intent to acquit. In the present case, the court disclaimed such intent by noting that the case could be refiled and retried. Third, as discussed in the next section, the court in *Weinstein* refused to recognize an order the court had no jurisdiction to make.

II.

THE DISMISSAL ORDER SHOULD NOT BE CONSTRUED AS AN ACQUITTAL BECAUSE THE TRIAL JUDGE HAD NO LEGAL AUTHORITY TO ACQUIT AFTER A HUNG JURY

In *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, the trial judge granted the defendant's motion for judgment of acquittal following discharge of a deadlocked jury. Federal law provides that such motions may be made within seven days after a jury is discharged. Federal Rule of Criminal Procedure 29 is entitled Motion for Judgment of Acquittal, and is reproduced in Appendix N. The determinative issue in *Martin Linen* was "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, or some or all of the factual elements of the offense charged." *Id.* at p. 571. The Supreme Court concluded that the judgments of the trial court were acquittals in substance as well as in form, barring appeal under the double jeopardy clause of the Fifth Amendment. *Id.* at p. 572. The Supreme Court also relied upon the statements of the trial court that "the Government has failed to prove the material allegations beyond a reasonable doubt" and that "defendant should be found 'not guilty.'" *Id.* at p. 572. The court held that "Rule 29 merely replaces the directed-verdict mechanism . . . and accords the federal trial judge greater flexibility in timing his

judgment of acquittal . . ." *Id.* at p. 573. The court at p. 575 distinguished *United States v. Sanford* (1976) 429 U.S. 14, which permits retrial after a hung jury and dismissal.

Rule 29 does not apply in California state court cases, and there is no California equivalent which allows acquittal after a guilty verdict. In *People v. Superior Court (Jonsson)* (1966) 240 Cal.App.2d 90, 49 Cal.Rptr. 365, the court held that the trial court has no authority to enter a judgment of acquittal notwithstanding a verdict of guilty. (*Jonsson* was disapproved in *People v. Superior Court (Howard)*, *supra*, 69 Cal.2d at p. 501, on the issue of the right of the prosecution to seek mandamus relief.)

Unlike an acquittal under Rule 29, a dismissal pursuant to Penal Code section 1385 does not resolve any factual elements of the crime, but merely reflects the court's conclusion that dismissal would be "in furtherance of justice." The dismissal in the present case is thus not equivalent to the acquittals in the federal cases under Rule 29. Unlike *Martin Linen*, the present case does not involve the court placing the wrong "label" on its ruling. If the dismissal was not a dismissal, then what was it? Clearly, the court properly characterized its ruling as a dismissal.

In *United States v. Weinstein, supra*, the court refused to characterize a dismissal following entry of judgment as an acquittal because the trial judge had no jurisdiction under Rule 29 to acquit at that stage of the proceedings. In the present case as well, the trial judge had no authority to acquit after discharging the jury. The Court of Appeals in the present case errs in treating the dismissal as an acquittal when the trial court expressed no intent to acquit and had no legal authority to acquit. Federal courts should not recharacterize state court orders as orders the court had no jurisdiction to make.

III.

FEDERAL HABEAS COURTS SHOULD GIVE DEFERENCE TO STATE COURTS' INTERPRETATIONS

Federal courts owe respect to the states and should not "undermine the State's interest in enforcing its laws." *Coleman v. Thompson* (1991) 501 U.S. ____, 115 L.Ed. 2d 640, 654, 656, 111 St.Ct. 2546, 2552, 2554, reh. denied, 115 L.Ed.2d 1109, 112 S.Ct. 27.

In *Wright v. West* (1992) 505 U.S. ____, 120 L.Ed.2d 225, 112 S.Ct. 2482, this Court discussed the standard of review a federal court should employ on habeas corpus from a state court judgment. The court noted that habeas review of state court judgments "'entails significant costs.'" 120 L.Ed.2d at p. 239, 112 S.Ct. at p. 2491. The court quoted from *Duckworth v. Eagan* (1989) 492 U.S. 195, 210 (O'Connor, J., concurring) (quoting *Harris v. Reed* (1989) 489 U.S. 255, 282 (Kennedy, J., dissenting)):

> Among other things, "'[i]t disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'"

The court in *Wright v. West* considered whether deference should be given to the state court for mixed constitutional questions and whether "a habeas judge need not—and indeed may not— 'shut his eyes' entirely to state-court applications of law to fact." 120 L.Ed.2d at p. 240, 112 S.Ct. at p. 2491. However, the court declined to resolve these "far-reaching issues" because the evidence supported the conviction under any standard. 120 L.Ed.2d at p. 240, 112 S.Ct. at p. 2492.

It is appropriate in the present case to resolve the issue of deference on mixed constitutional questions. The Court in the present case should answer the question left unanswered in *Wright v. West*.

The dismissal order in the present case is ambiguous; whether or not it constitutes an implied acquittal precluding retrial depends upon the application of the Double Jeopardy Clause to the dismissal order in the context of the other orders in the case and California statutory provisions. The trial judge stated that the evidence was insufficient, but did so under California Penal Code section 1385, which allows dismissal "in furtherance of justice." The dismissal also followed two rulings that there was *sufficient* evidence under California Penal Code section 1118.1. State court judges use these statutes on a daily basis and are in the best position to interpret them and rulings made pursuant to them. As noted in *Wright v. West, supra,* "State judges are more familiar with the elements of state offenses than are federal judges and should be better able to evaluate sufficiency claims." 120 L.Ed.2d at p. 237, 112 S.Ct. at p. 2489. The same rationale should apply to the orders pursuant to the state procedural statutes involved here.

As discussed above, the trial judge's intent is relevant in interpreting the trial court's ruling. Of course, the trial judge was in the best position to know what his intent was: that respondent could be retried. The municipal court evaluated the effect of the dismissal order in light of the Double Jeopardy Clause and concluded that the order did not constitute an implied acquittal precluding retrial.

Respondent also raised the double jeopardy issue in petitions for writs of mandate in the superior court, California Court of Appeal and California Supreme Court. All of these petitions were denied. These denials, which were without opinion or citation to authority, are presumed to be based on the merits. *Turner v. Compoy* (9th Cir. 1987) 827 F.2d 526, 529, cert. denied, 489 U.S. 1059, reh. denied, 490 U.S. 1031.

The federal courts below should have given deference to the conclusion of the state courts. Had the federal courts done so, the writ would have been denied and the sovereignty of the state would have been upheld.

In *Lewis v. Jeffers* (1990) 497 U.S. ____, 111 L.Ed.2d 606, 622-624, 110 S.Ct. 3092, 3102-3104, the court adopted a "rational factfinder" standard to review on habeas corpus a state court's determination of aggravating circumstances. This standard is also appropriate in the present case because the interpretation of the dismissal order is largely a determination of what a dismissal means under California Penal Code section 1385, and the effect of denial of acquittal motions under California Penal Code section 1118.1. These applications and interpretations of state law are best resolved by the state court, and federal courts should give deference to the state court's conclusion.

The Court of Appeals cites *Greene v. Massey* (1978) 437 U.S. 19. (Slip. op., p. 6885.) In that case, a per curiam opinion by the Florida Supreme Court had found "that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial." *Id.* at p. 21. Three justices of the Florida Supreme Court filed a concurring opinion which found trial error. The Florida District Court of Appeal had interpreted the Florida Supreme court opinion as a finding of technical *sufficiency* of the evidence and the grant of a new trial in the interest of justice. *Id.* at p. 22 and fn. 2. The United States Supreme Court expressed no opinion as to the validity of this interpretation (*Id.* at p. 26, fn. 10), but remanded the case to clarify the ambiguities in the state court orders. *Id.* at pp. 26-27.

Subsequent to the Supreme Court's opinion, the Court of Appeals certified the case to the Florida Supreme Court, and then reexamined the issue in *Greene v. Massey* (5th Cir. 1983) 706 F.2d 548, cert. denied, 464 U.S. 1046, reh. denied, 465 U.S. 1074. The Court of Appeals considered itself bound by the interpretation given to the original per curiam opinion by later decisions of the Florida courts, and concluded:

> The reversal of Greene's first conviction was therefore not based on insufficiency of the evidence, but instead the reversal was based on the weight of the evidence and the "interests of justice."

Id. at p. 553.

The court thus denied habeas corpus relief. The court held that the Supreme Court opinion in *Tibbs v. Florida, supra*, did not mandate a contrary result.

As in *Greene v. Massey*, the state court in the present case concluded that there was no finding of insufficiency of the evidence that would bar retrial. Because this conclusion is a reasonable interpretation of the record, the court in the present case, as in *Greene v. Massey*, should rely upon the conclusion of the state court.

CONCLUSION

The Double Jeopardy Clause should not be interpreted to prevent retrial after a hung jury. The dismissal of charges "in furtherance of justice" does not constitute an implied acquittal which bars retrial when the trial judge expresses an intent that the defendant may be recharged and retried. In interpreting the state court's dismissal order in light of the Double Jeopardy Clause, federal courts should give deference to the interpretations and conclusions of the state court.

We respectfully request that a writ of certiorari issue in this case to resolve these important issues.

Respectfully submitted,

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APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DIANE HELEN MANNES,
Petitioner-Appellee,

v.

JOHN V. GILLESPIE, Sheriff,
Respondent-Appellant.

No. 91-55336
D.C. No.
CV-90-3297-AWT
OPINION

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
December 3, 1991—Pasadena, California

Filed June 22, 1992

Before: James R. Browning, Robert Boochever and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Browning

SUMMARY

Criminal Law and Procedure/Double Jeopardy

Affirming a district court grant of habeas relief "forever prohibiting" the retrial of petitioner on murder charges, the court of appeals held that the district court's dismissal of the murder charges after a mistrial and a finding that the evidence at trial was insufficient to convict petitioner of murder was an acquittal for the purposes of the Double Jeopardy Clause barring reprosecution on those charges.

Appellee Diane Helen Mannes killed three pedestrians while driving under the influence of alcohol in violation of California law. After trial in Superior Court, the jury convicted Mannes of driving under the influence and deadlocked on the murder charges, which included vehicular manslaughter as a lesser-included offense. The trial court accepted the guilty verdicts, but declared a mistrial on the murder charges and discharged the jury. Subsequently, the trial court, on his own motion, dismissed the murder charges under Cal. Pen. Code § 1385, granting trial judges broad authority to dismiss cases in "furtherance of justice." The prosecutor then re-filed the murder charges in Municipal Court. Although Mannes objected to retrial as a violation of the Double Jeopardy Clause, the Municipal Court judge ordered Mannes to stand trial. Mannes unsuccessfully exhausted her state court remedies. The district court then granted Mannes petition for habeas relief, enjoining California from prosecuting Mannes for the murders. The state appealed.

[1] A claim that a state prosecution will violate the Double Jeopardy Clause presents an exception to the general rule of *Younger v. Harris* requiring federal courts to abstain from interfering with pending state criminal proceedings. However, because full vindication of the fifth amendment's protection against double jeopardy necessarily requires intervention before trial, federal courts will entertain pretrial habeas petitions that raise a colorable claim of double jeopardy. **[2]** The court noted that an accused has a strong interest in not being faced with murder charges even if a manslaughter trial is possible because the inclusion of a greater charge barred by double jeopardy can prejudice the ability of the accused to defend against a lesser charge.

[3] Because a § 1385 dismissal may, but need not be based on insufficiency of the evidence, the reason for the dismissal governs its effect for double jeopardy purposes. **[4]** Here, the language of the dismissal order supported Mannes' interpretation that it was based on a determination that the evidence

presented at trial was legally insufficient to support a verdict of guilty of murder. [5] The order did not say the trial court resolved any questions of credibility, a feature common to decisions based on weight rather than sufficiency. Nor did the order support the state's suggestion that the trial court was acting as the "13th juror."

[6] Although California law allows a felony charge dismissed once under § 1385 to be re-filed, apparently even if dismissal was based on insufficiency of the evidence, [7] the trial court's ruling that the evidence presented at trial was insufficient to convict Mannes of murder was the equivalent of an acquittal for purposes of the Double Jeopardy Clause. A judgment of acquittal entered after a deadlocked jury is dismissed terminates jeopardy and prevents retrial.

COUNSEL

Michael D. Schwartz, Deputy District Attorney, Ventura, California, for the respondent-appellant.

Neil B. Quinn, Deputy Public Defender, Ventura, California, for the petitioner-appellee.

OPINION

BROWNING, Circuit Judge:

The district court issued a writ of habeas corpus "forever prohibiting" the retrial of petitioner Diane Helen Mannes on three murder charges. The state argues the district court should have abstained, and, alternatively, that the court erred in ruling retrial of Mannes for the three murders was barred by the Double Jeopardy Clause. We affirm.

I

While driving under the influence of alcohol, Mannes struck five pedestrians, killing three and injuring two others. She was charged with three counts of murder (Cal. Pen. Code § 187(a)), one count of driving under the influence and causing injury (Cal. Veh. Code § 23153(a)), and one count of driving with a blood alcohol level of .10 percent or more and causing injury (Cal. Veh. Code § 23153(b)).

The charges were tried in Superior Court. The jury found Mannes guilty of both charges of driving under the influence and deadlocked on the three murder charges. The trial judge accepted the guilty verdicts, declared a mistrial on the murder charges, and discharged the jury.[1] Mannes was sentenced to four years in prison on the driving under the influence counts.

Two weeks after discharging the jury, the judge, acting on his own motion, dismissed the murder charges pursuant to Cal. Pen. Code § 1385, granting trial judges broad authority to dismiss cases "in furtherance of justice."[2]

The district attorney re-filed the murder charges in Municipal Court. Mannes objected on the ground retrial for murder

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[1]Pursuant to California law, the jurors were instructed on vehicular manslaughter, a lesser-included offense on the murder charges, but were told not to return a verdict on manslaughter unless they first unanimously agreed to acquit on the murder charges. *See People v. Hunter*, 782 P.2d 608, 617-18 (Cal. 1989) (approving such jury instructions). Since the jury deadlocked on the three murder charges and was then dismissed, no verdict was returned for manslaughter.

[2]Section 1385 provides:

> (a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. . . . .

Cal. Pen. Code § 1385(a).

would violate the Double Jeopardy Clause. The Municipal Court judge bound Mannes over for trial. Mannes' petition to the Superior Court for a writ of prohibition, her petition to the Court of Appeal for a writ of mandate, and her petition for review to the California Supreme Court were all denied without comment.

Mannes then sought a writ of habeas corpus from the court below. The district court granted the writ, enjoining California from prosecuting Mannes for the murders. The state appealed.

II

[1] Since Mannes exhausted state remedies on her double jeopardy claim, the district court had jurisdiction to hear her petition under 28 U.S.C. § 2254. *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-03 (1984). A claim that a state prosecution will violate the Double Jeopardy Clause presents an exception to the general rule of *Younger v. Harris*, 401 U.S. 37 (1971), requiring federal courts to abstain from interfering with pending state criminal proceedings. The Fifth Amendment's protection against double jeopardy — "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb" — "is not against being twice punished, but against being twice put in jeopardy," *United States v. Ball*, 163 U.S. 662, 669 (1896); *Abney v. United States*, 431 U.S. 651, 661 (1977). Because full vindication of the right necessarily requires intervention before trial, federal courts will entertain pretrial habeas petitions that raise a colorable claim of double jeopardy. *Hartley v. Neely*, 701 F.2d 780, 781 (9th Cir. 1983) ("[P]retrial habeas corpus review is appropriate in those cases where, as here, all other state remedies were exhausted."); *Greyson v. Kellam*, 937 F.2d 1409, 1412-13 (9th Cir. 1991).

The state contends, however, that the district court should have abstained because, as in *Doe v. Donovan*, 747 F.2d 42 (1st Cir. 1984), even if Mannes' petition were granted she

could be retried for manslaughter, though not for murder,[3] and would remain in custody serving her sentence on the convictions for driving under the influence.

In *Doe*, the petitioner sought a writ of habeas corpus to prevent a Massachusetts juvenile court from trying her for murder, claiming trial on that charge would violate the Double Jeopardy Clause. *Id.* at 43. The court acknowledged the general rule that "a colorable double jeopardy claim may constitute the threat of injury necessary to fall within the exception to the *Younger* abstention principle," *id.* at 44, but held the exception inapplicable. The court explained that the petitioner would in any event be "subjected to the ordeal of a trial" for manslaughter, and "[b]ecause of the unique jurisdictional posture of this case," she would not suffer significantly greater injury if required to stand trial for murder rather than manslaughter, even if trial for the murder charges were subsequently found to have been barred by the Double Jeopardy Clause. *Id.* at 44-45. Trial for murder involved no greater risk to petitioner than trial for manslaughter. Petitioner was to be tried in juvenile court, would reach age 18 in less than a year, she could not be held in custody beyond that date whether she was convicted of murder or manslaughter. *Id.* at 45. This was the "[m]ost important" reason the court regarded abstention as appropriate. *Id.*

[2] No similar circumstance is present here. Moreover, an accused has a strong interest, which the court in *Doe* did not consider, in not being faced with murder charges even if a manslaughter trial is possible. The inclusion of a greater charge barred by double jeopardy can prejudice the ability of the accused to defend against a lesser charge. The prejudice may be so great as to require that a conviction on the lesser charge be overturned. *Price v. Georgia*, 398 U.S. 323, 331-32

[3]Mannes has not disputed the state's contention she can be retried for manslaughter even if the section 1385 dismissal bars retrial on the murder charges. We express no opinion on this issue.

(1970); *Morris v. Mathews*, 475 U.S. 237, 245-46 (1986). Because the accused already has been subjected to the ordeal of trial, overturning such a conviction is not a complete remedy for the double jeopardy violation. Further, the Supreme Court has recognized that, contrary to the apparent assumption of the court in *Doe*,

> [t]here is a significant difference to an accused whether he is being tried for murder or manslaughter. He has reason for concern as to the consequences in terms of stigma as well as penalty. He must be prepared to meet not only the evidence of the prosecution and the verdict of the jury but the verdict of the community as well.

Price v. Georgia, 398 U.S. at 331 n.10.

Doe involved unique facts and its reasoning has not been followed by any subsequent case. Because Mannes faced the possibility of irreparable injury if forced to stand trial on murder charges that might be barred by the Double Jeopardy Clause, the district court properly heard her petition.

III

We decide de novo whether retrial of Mannes for the murders is barred by the Double Jeopardy Clause. *Gray v. Lewis*, 881 F.2d 821, 822 (9th Cir. 1989).

Jeopardy attached when the jury was sworn. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Jeopardy did not terminate when the trial judge declared a mistrial after the jury deadlock. Accordingly, California was free to retry Mannes. *Richardson v. United States*, 468 U.S. 317, 326 (1984). Mannes argues, however, that the trial judge's *sua sponte* dismissal of the murder charges pursuant to Cal. Pen.

Code § 1385 two weeks after the mistrial was equivalent to an acquittal, terminating jeopardy and preventing retrial.[4]

Section 1385 provides that a trial judge may, either on the judge's own motion or that of the prosecutor, order an action dismissed "in furtherance of justice." An action may be dismissed under section 1385 before, during, or after trial. *People v. Orin*, 533 P.2d 193, 199 (Cal. 1975). A trial judge has broad but not unlimited discretion to dismiss under section 1385, *id.*; the court must consider "the constitutional rights of the defendant, and the interests of society represented by the People, in determining whether there should be a dismissal. At the very least, the reason for dismissal must be that which would motivate a reasonable judge." *Id.* (citations and emphasis omitted).

The impact of a section 1385 dismissal upon the application of the Double Jeopardy Clause depends on the reason for the dismissal. The relevant principles are discussed in *Hudson v. Louisiana*, 450 U.S. 40 (1981). After conviction by a jury, Hudson moved for a new trial, which the trial judge granted. *Id.* at 41. Louisiana law allowed the trial judge to order a new trial if "[t]he verdict is contrary to the law and the evidence," *Id.* at 41 n.1. The Supreme Court concluded that the trial judge "granted the new trial because the State had failed to prove its case as a matter of law, not merely because he, as a '13th juror' would have decided it differently." *Id.* at 44. What mattered for the purposes of the Double Jeopardy

[4]The state argues that "[b]ecause the jury hung, jeopardy did not attach and the parties were placed in the status quo as if no trial had occurred" and therefore that "the dismissal here must be considered a pretrial pre-jeopardy ruling which does not constitute an acquittal." Appellant's Opening Brief at 20. We disagree. While a jury deadlock does not terminate jeopardy, neither does it mean jeopardy has never attached. If Mannes is correct that the section 1385 dismissal was an acquittal, retrial would place her in jeopardy a second time. *See Martin Linen*, 430 U.S. at 575-76 (a judgment of acquittal, entered after hung jury, "concludes a pending prosecution in which jeopardy has attached" and precludes retrial).

Clause was the ground for the trial judge's order; because the judge determined that the state had failed to prove its case, retrial was barred.

An analogous situation is presented when an appellate court reverses a conviction. If the conviction is reversed for trial error there is no bar to retrial, but if reversal is based on insufficiency of the evidence presented at trial, retrial is precluded by the Double Jeopardy Clause. *Burks v. United States*, 437 U.S. 1, 15-18 (1978); *Greene v. Massey*, 437 U.S. 19, 24-26 (1978). Again, what matters is the reason for the decision.

[3] Because a section 1385 dismissal may, but need not be based on insufficiency of the evidence, the reason for the dismissal governs its effect for double jeopardy purposes. In ordering the dismissal under section 1385 in this case, the Superior Court judge stated he did so "for the following reasons":

> 1. There is insufficient evidence in this case that the defendant acted with "implied malice" as required for a verdict of guilty of murder.
>
> 2. There was insufficient evidence that the defendant was aware at the time of her drunk driving in this case, that she was committing an act that carried a high probability of death to herself or anyone;
>
> 3. There was insufficient evidence that being so aware, she consciously decided to do the act anyway, and
>
> 4. There is no likelihood that a retrial on these charges will result in a unanimous verdict of guilty of murder.

The state argues that the judge's statement of the reasons for dismissal was "gratuitous," and, like dicta, should not be

legally binding. The state adopts this argument from the oral ruling of the Municipal Court interpreting the Superior Court's statement of reasons:

> And the comments that [the Superior Court judge] made on pages 4 and 5 of his order I think were gratuitous, to the extent that he was suggesting that, in his view, it's unlikely that a jury would return a unanimous verdict on the murder. I don't think he was making a finding as a matter of law that there was insufficient evidence. So the motion to dismiss is denied.

Under California law, "[t]he reasons for the dismissal *must* be set forth in an order entered upon the minutes." Cal. Pen. Code § 1385(a) (emphasis added). This requirement "is mandatory and not merely directory" and the failure to set forth reasons "is fatal and is alone sufficient to invalidate the dismissal ...." *People v. Orin*, 533 P.2d at 198-99; *see also People v. Howard*, 446 P.2d 138, 146 n.7 (Cal. 1968) ("If the reasons are not set forth in the minutes, the order dismissing may not be considered a dismissal under Section 1385."). Thus, the Superior Court's statement of reasons was not "gratuitous;" it is the strongest evidence of the grounds for the dismissal.

Mannes argues the dismissal was based on a determination the evidence presented at trial was legally insufficient to support a verdict of guilty of murder. The state argues dismissal was based on the "weight," rather than the "sufficiency" of the evidence or was based on the views of the trial judge acting as a "13th juror." Reversal of a conviction as against the weight, rather than the sufficiency, of the evidence does not prevent retrial, *Tibbs v. Florida*, 457 U.S. 31, 42-45 (1982); *Hudson*, 450 U.S. at 43-45 & n.5, and the state argues the same distinction should apply to the dismissal of charges after a mistrial.

[4] The language of the dismissal order supports Mannes' interpretation. The order does not refer at all to the "weight" of the evidence but refers several times to "insufficient evidence." As the Supreme Court has noted, "trial and appellate judges commonly distinguish between the weight and the sufficiency of the evidence." *Tibbs,* 457 U.S. at 44. Further, there was no occasion to set aside a verdict as "against the weight" of the evidence, since no verdict was reached. "A reversal based on the weight of the evidence . . . can occur only after the State both has presented sufficient evidence to support conviction *and has persuaded the jury to convict.*" *Id.* at 42-43 (emphasis added).

[5] The order does not say the trial judge resolved any questions of credibility, a feature common to decisions based on weight rather than sufficiency. *See id.* at 37-38 & n.11. Nor does the order support the state's suggestion the trial judge was acting as a "13th juror" — the order does not refer to the opinion of the judge as to guilt, but instead states "[t]here is insufficient evidence in this case that the defendant acted with 'implied malice' *as required for a verdict* of guilty of murder," and concludes "[t]here is no likelihood that a retrial on these counts will result in a *unanimous verdict* of guilty of murder." (emphasis added).

In this context, the phrase "insufficient evidence" is a term of art. In the absence of a clear indication to the contrary, we must assume the trial judge intended the phrase to carry its accepted meaning that the evidence presented at the trial was not legally sufficient to support a conviction for the crime charged, rather than that the judge "entertained personal doubts about the verdict." *Hudson,* 450 U.S. at 44. *See Delap v. Dugger,* 890 F.2d 285, 310 (11th Cir. 1989) (" '[I]nsufficient' evidence is a legal term of art, indicating that there was no evidence which would enable a reasonable jury to find the defendant guilty.").[5]

[5]The state notes that the trial judge denied Mannes' motions for acquittal after the prosecution rested its case and at the close of the evidence. We

[6] California law allows a felony charge dismissed once pursuant to section 1385 to be re-filed, apparently even if dismissal was based on insufficiency of the evidence. *See People v. James*, 162 Cal. Rptr. 263 (Cal. Ct. App. 1980). The trial judge in this case believed retrial would be possible. Nevertheless, whether the Double Jeopardy Clause bars a prosecution is not determined by the characterization of a dismissal under state law, nor by the trial judge's personal understanding in this regard. *Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.5 (1986); *United States v. Scott*, 437 U.S. 82, 96 (1978). What matters is whether the ruling in Mannes' favor was actually an "acquittal" even if state law or the trial court may have labeled it otherwise. *See Martin Linen*, 430 U.S. at 571 n.9; *see also Hudson*, 450 U.S. at 41-45 (finding of insufficient evidence, though made in the course of granting a motion for new trial, is an acquittal for double jeopardy purposes).

[7] The trial judge's ruling that the evidence presented at trial was insufficient to convict petitioner of murder was an acquittal for the purposes of the Double Jeopardy Clause. *Richardson*, 468 U.S. at 325 n.5 ("[A] trial court's finding of insufficient evidence . . . is the equivalent of an acquittal."); *Hudson*, 450 U.S. at 44-45 & n.5. A judgment of acquittal entered after a deadlocked jury is dismissed terminates jeop-

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agree with the state that, if the evidence presented at trial was insufficient, the trial court should have granted the motions for acquittal pursuant to Cal. Pen. Code § 1118.1. Nevertheless, the state points to no bar to reconsideration by the trial court of the sufficiency of the evidence. The state's argument that a California trial judge has no authority to "acquit" a defendant pursuant to section 1385 is misplaced. What matters is whether, regardless of what label is attached to the dismissal, the reason for dismissal was insufficiency of the evidence presented at trial. Insufficiency of the evidence is plainly a reason that "would motivate a reasonable judge," and dismissal under section 1385 for this reason has precedent under California law. *See, e.g., People v. Howard*, 446 P.2d at 141, 147-48 (approving of section 1385 dismissal due to "[i]nsufficiency of the evidence to prove the defendant's guilt beyond a reasonable doubt").

ardy and prevents retrial. *Martin Linen*, 430 U.S. at 572, 575-76. The district court correctly ruled that retrial of Mannes for murder is barred by the Double Jeopardy Clause.[6]

AFFIRMED.

[6]Citing *Grady v. Corbin*, 495 U.S. 508 (1990), Mannes argues for the first time on appeal that the Double Jeopardy Clause bars her retrial for murder (and presumably for manslaughter) because she was convicted of the two driving under the influence counts. She contends a new prosecution is prohibited because the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 521. Because Mannes did not raise this issue in her habeas petition, it is not properly before us. *Willard v. People of State of California*, 812 F.2d 461, 465 (9th Cir. 1987); *Ahlswede v. Wolff*, 720 F.2d 1108, 1109 (9th Cir. 1983). Moreover, Mannes has not presented this claim to the state courts. Exhaustion of state remedies is a prerequisite to federal habeas review. *Justices of Boston Mun. Court*, 466 U.S. at 303.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

PEOPLE OF THE
STATE OF CALIFORNIA,
Plaintiff,

CASE NO. CR-24885

v.

DIANE HELEN MANNES,
Defendant.

Honorable Robert J. Soares, Judge

PARTIAL TRANSCRIPT OF NOVEMBER 7, 1989

The Court: All right. The motion is denied. It is my understanding under the requirement of Section 1118.1, which I assume your motion was made under, rather than 1118.

Mr. Dahlstedt [defense counsel]: That is correct.

The Court: That the Court is to grant this motion only when there is no evidence to sustain a jury's decision.

And with respect to your analysis of the reasonable doubt, if the Court were in a criminal matter to hold a reasonable doubt concerning the defendant's guilt, that does not mean that an 1118 - because it's a decision in a jury trial that the jury makes not the Judge - the Judge is not the finder of fact, nor to give credibility to the witnesses.

The motion has been denied.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	)	CASE NO. CR-24885
v.	)	
DIANE HELEN MANNES, Defendant.	)	

Honorable Robert J. Soares, Judge

PARTIAL TRANSCRIPT OF NOVEMBER 9, 1989

The Court: All right. These proceedings are outside the presence of our jury.

Are there any matters that need to be discussed by counsel at this time?

Mr. Dahlstedt: Yes, your Honor.

I would like to make an 1118.1 motion again. I believe I am entitled to after the close of the case by either side.

I think that the district attorney has not presented, again, any evidence on the element of high probability. The only evidence that we have is that it is not very probable.

And now the district attorney can challenge that evidence, but you have to remember he has the burden. And even in an 1118.1 it recognizes the burden is on the prosecution to present, not only some evidence, but to carry the burden proving the case.

And at this point we have no evidence at all. He can argue with the evidence that I presented, but he has no evidence on his own.

Now I would just submit to the Court that the element of high probability of death has not been shown and that I think the 1118.1 should be granted on that basis.

The Court: The motion is denied.

The law with respect to the 1118.1 at the close of all the evidence requires that the Court, in addition to the People's evidence, weigh the evidence by the Defense. And any evidence that is produced by the Defense is to be considered in making the decision as to whether an 1118.1 should be granted.

And for the reasons I stated at the time of the original motion I am still of the opinion there is enough evidence before this jury for the 1118.1 to be denied and it is.

All right. We are in recess till Wednesday morning.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

FILED: December 1, 1989

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff	)	NO. CR24885
vs,	)	ORDER ON REQUEST TO RESET MURDER CHARGES FOR TRIAL
DIANE MANNES Defendant	)	

This order is in response to the People's motion to reset the murder counts upon which the jury was unable to reach a verdict and the defendant's objections thereto.

After the jury was discharged the district attorney requested that the court continue the case so that motions regarding retrial and sentencing could be presented to the court. The court did this. At the hearing, the district attorney simply stated that the court should reset the murder charges for trial, because the district attorney's office was going to retry the defendant for murder no matter what the trial court did, so I should just save everyone's time and money and reset the trial. I believe judicial decisions of this magnitude should not be made solely upon such grounds.

The court in ruling upon the motion of the district attorney to reset counts 1, 2 and 3 for trial must consider many things. In this order I will try to set out the factors which bear on this decision. I have done so in writing so that, right or wrong, I will not be misunderstood or misquoted.

Under the laws of our state, the district attorney is given the legal duty to examine the case as presented to the first jury and any additional evidence which can be presented at a second trial and decide whether:

(1) He is convinced beyond a reasonable doubt that the defendant is guilty of the murder charge; and

(2) Whether the case can be presented to a new jury in such a way that all 12 jurors will also be convinced beyond a reasonable doubt that the defendant is guilty of murder; and

(3) The interests of justice require a conviction at the level of murder for the acts committed.

If all three of the above criteria have been satisfied, then the motion to reset should be made to the trial judge.

While, as a judge, I have no way of reviewing the thought process of the district attorney with respect to criteria (1) above, it is my duty to review criteria (2) and (3) to determine whether the case should be reset for trial.

In deciding whether a second trial could be successful, we need to analyze the first trial to see what might be done differently so that a different result could be expected.

The time between arrest and trial was nearly seven months. Clearly this was ample time to investigate, obtain witnesses, gather evidence, and prepare for trial.

The case was assigned to one of the most senior, experienced, and capable trial attorneys in the district attorney's office.

The jury was selected with great care. Twelve trial jurors and two alternates were selected, accepted and approved by the court, district attorney and the defendant. A review of each selected juror reveals a true cross-section of our society, each dedicated to following the law

and determining the facts from the evidence presented. All prospective jurors who even appeared to have pro-prosecution or pro-defense leanings were excused. Jury selection actually took approximately 40 per cent of the total jury trial time and was done with great deliberation.

All witnesses sought to be produced by the prosecution were available at trial and provided their testimony to the jury.

The jury was instructed in the applicable law. The district attorney sought no instructions which were not given nor did he object to any of those given.

The jury gave all indications of having deliberated carefully and taking their grave responsibilities in the manner which this case deserved.

Inasmuch as the district attorney had elected to charge these deaths only as murder, the jury, unless they unanimously agreed that the defendant was not guilty of murder did not even have the choice to find her guilty of manslaughter. Their final vote was seven to five in favor of conviction—close to an even split jury.

I can see no reasonable possibility that a new jury could arrive at a unanimous verdict of guilty on the murder charge in this case. The district attorney has not even offered to amend the charge so that the jury would have the choice to find the defendant guilty of manslaughter without having to unanimously agree that she is not guilty of murder. Without such an option, it is my finding that one, or ten, retrials would not result in a unanimous verdict of guilty as to murder.

I have no illusions that my decision to dismiss these charges will be met with approval of the families and friends of the victims, or by much of the public at large. For who likes drunk drivers—and even less—much less—who likes drunk drivers who kill!! Which of us who have lost one of our children does not wish to the maximum penalty for their killer.

I am aware that our laws provide that this dismissal does not prevent the refiling of these murder charges—and a new trial. But that fact does not take away my obligations as the trial judge to rule on this matter in a manner which is not based upon public feelings, or public opinion.

The jury did convict the defendant of felony drunk driving and causing injury to two people. She shall be punished for that. She also should not escape punishment for any deaths she has caused. Provided she is properly charged, I am certain she will not.

Counts 1, 2 and 3 are dismissed pursuant to section 1385 of the Penal Code for the following reasons

1. There is insufficient evidence in this case that the defendant acted with "implied malice" as required for a verdict of guilty of murder.

2. There was insufficient evidence that the defendant was aware at the time of her drunk driving in this case, that she was committing an act that carried a high probability of death to herself or anyone;

3. There was insufficient evidence that being so aware, she consciously decided to do the act anyway, and

4. There is no likelihood that a retrial on these charges will result in a unanimous verdict of guilty of murder.

Dated: November 30, 1989

/s/ R. J. Soares
ROBERT J. SOARES
Judge of the Superior Court

APPENDIX E

VENTURA COUNTY MUNICIPAL COURT
STATE OF CALIFORNIA

COURTROOM 12 HON. BRUCE A. CLARK, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	)	
	)	NO. FE-74948
vs.	)	
DIANE HELEN MANNES, Defendant.	)	

PARTIAL TRANSCRIPT OF PROCEEDINGS

Wednesday, January 10, 1990

THE COURT: In reading the order prepared by Judge Soares, it appeared to me that it was more to his comments criticizing the district attorney for his pleadings, suggesting that the pleadings should have included counts of manslaughter to give the jury the opportunity to consider that.

And the comments that Judge Soares made on pages 4 and 5 of his order I think were gratuitous, to the extent that he was suggesting that, in his view, it's unlikely that a jury would return a unanimous verdict on the murder. I don't think he was making a finding as a matter of law that there was insufficient evidence. So the motion to dismiss is denied.

APPENDIX F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

JUDGE: LAWRENCE STORCH

CASE NO.: 109934 DATE: 3-16-90 TIME: 1:30

CLERK: CHRIS LEAVITT
BAILIFF: V. MARKLEY
CRT. RPTR: M. HECKERMAN
DDA: MICHAEL SCHWARTZ
DEFENSE CNSL: ROBERT DAHLSTEDT

TITLE OF CASE:

DIANE HELEN MANNES
Plaintiff

vs.

VENTURA MUNICIPAL COURT
Defendant

NATURE OF PROCEEDINGS:
PETITIONER'S OSC RE: WRIT OF PROHIBITION-DENIED

(/) Petition for: (/) Writ of Prohibition (/) Denied

THE COURT ORDERS ALL PROCEEDINGS IN MUNICIPAL COURT STAYED TO APRIL 16, 1990.

SHEILA GONZALEZ, Superior Court
Executive Officer and Clerk

/s/ Chris Leavitt
Deputy Clerk

CRIMINAL WRIT/MOTION/REQUEST MINUTE ORDER

APPENDIX G

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 6

DATE: 03/29/90

RE: Mannes, Diane Helen
vs.
Ventura County Superior Court
The People of the State
2 Criminal B049021
Ventura No. CR24885

THE COURT:
PETITION FOR WRIT OF MANDATE DENIED

APPENDIX H

FILED: MAY 23, 1990

ORDER DENYING REVIEW
AFTER JUDGMENT OF THE COURT OF APPEAL

Second Appellate District, Division Six, No. B049021
S014921
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

DIANE HELEN MANNES, Petitioner

v.

VENTURA COUNTY SUPERIOR COURT, Respondent

THE PEOPLE, Real Party in Interest

Petition for review DENIED.

/s/ LUCAS
Chief Justice

APPENDIX I

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED DECEMBER 27, 1990

DIANE HELEN MANNES,)	
)	CASE NO. CV90-3297-AWT (B)
Petitioner,)	
v.)	REPORT AND
)	RECOMMENDATION OF
JOHN V. GILLESPIE,)	UNITED STATES MAGISTRATE
SHERIFF, et al.,)	JUDGE
)	
Respondents.)	

This Report and Recommendation is submitted to the Honorable A. Wallace Tashima, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

Petitioner, through counsel and paying the $5.00 filing fee, initiated this action on June 25, 1990 by filing her Petition for Writ of Habeas Corpus by a Person in State Custody. On July 27, 1990, Your Honor held a hearing on this Magistrate's recommendation that this court stay petitioner's retrial in Superior Court pending adjudication of her contention herein that such retrial is precluded by the Constitutional prohibition of double jeopardy, and by Stay Order of the same date, you stayed further proceedings in state court "until further order of this court."

A Return and a Traverse have been duly served and filed. The matter has been at issue without oral argument since September 4, 1990.

The pertinent facts are not disputed. Petitioner was charged in the Superior Court for the County of Ventura with three counts of murder "with malice aforethought" in driving with "gross negligence" while intoxicated, one count of driving under the influence of alcohol causing injury in violation of Vehicle Code Section 23153(a), and one count of driving with a blood alcohol level of .10%, causing injury, in violation of Vehicle Code Section 23153(b). She was convicted of both Vehicle Code violations, for which she was sentenced to imprisonment for four years. She is in custody serving this time, and in lieu of $250,000 bail for the still-pending murder charges. The jury hung (seven to five for conviction) as to the murder charges, whereupon a mistrial was declared on November 17, 1989. Record, page 60. Thereafter, "so that, right or wrong, I will not be misunderstood or misquoted," by Order On Request to Reset Murder Charges for Trial filed December 1, 1989, Trial Judge Robert J. Soares ordered that the three murder counts be "dismissed pursuant to section 1385 of the Penal Code for the following reasons:

"1. There is insufficient evidence in this case that the defendant acted with 'implied malice' as required for a verdict of guilty of murder.

"2. There was insufficient evidence that the defendant was aware at the time of her drunk driving in this case, that she was committing an act that carried a high probability of death to herself or anyone.

"3. There was insufficient evidence that being so aware, she consciously decided to do the act anyway, and

"4. There is no likelihood that a retrial on these charges will result in a unanimous verdict of guilty of murder." Record, pp. 71-72.

The District Attorney refiled the murder charges which had been so dismissed. Retrial was scheduled for July 30, 1990, and all available state remedies to avoid or postpone such retrial were exhausted. The District Attorney was unwilling to stipulate, and the Superior Court refused, to continue the trial pending the determination of this court in this action. Your Honor therefore issued the stay above mentioned.

The single question presented is whether on the undisputed facts of this case the Fifth Amendment to the United States Constitution prohibits the State from retrying petitioner on the murder counts.[1] Specifically, the Fifth Amendment provides

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb ...".

This has been interpreted to mean that a defendant cannot be retried if the evidence adduced at trial was legally insufficient to sustain a conviction. *Burks v. United States*, 437 U.S. 1, 15 *et seq.* (1978). It makes no difference whether it is the trial court or a reviewing court which determines the evidence is insufficient. *Burks* at 11. Where the trial court finds that the evidence at the first trial was legally insufficient to sustain a verdict, double jeopardy protection would be violated by a retrial on the same charges. *Hudson v. Louisiana*, 450 U.S. 40, 43 (1981). *That is this case!*

"(T)he prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Burks*, page 16.

But the prosecution does complain. First, it says "we deny that there was in fact insufficient evidence." Return, page 3. But the written determination of the trial judge is of the type made conclusive by 28 U.S.C. 2254(d), absent applicability of one of the eight numbered subsections. Significantly as to the subsections, the state record by which this court could have tested the accuracy of the trial judge's holding has not been presented by respondent. The finding is, therefore, binding here.

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[1]/Petitioner would not escape punishment for her conduct. As stated, she is now serving a four-year sentence for Vehicle Code violations. Her only defense to the murder charges was lack of malice. *She would plead guilty if charged with manslaughter*, rather than murder. Traverse, page 6.

The prosecution complains, second, that Judge Soares did not rule, as a matter of law, that the evidence was insufficient. Return, page 15. The Magistrate Judge has read, and with respondent's said theory in mind has reread, the said Order and respectfully disagrees. The trial judge was ruling as a matter of law, that is to say he was expressly applying the law (Penal Code Section 1385) to the facts. In so doing, he ruled that an essential element of the crime of murder, malice, had not been proved by sufficient evidence. Q.E.D.

The prosecution complains, third, that Judge Soares himself wrote in his subject order: "I am aware that our laws provide that this dismissal does not prevent the refiling of these murder charges — and a new trial." See Record, page 71. It is true that the trial judge wrote this.[2] It is equally true that even if California law otherwise permits a retrial, the Fifth Amendment prohibits it. And, the intention of the trial judge to allow a retrial is not determinative. *Hudson, supra*, 450 U.S. 40.

The prosecutor complains, fourth, that if the evidence really had been insufficient as a matter of law, petitioner's Penal Code Section 1118.1 motions would have been granted. Return, page 19. Said section directs that the trial court "shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient." But the trial judge misinterpreted Section 1118.1, mistakenly believing that "the Court is to grant this motion only when there is *no* evidence to sustain a jury's decision." Record, pp. 50-51, emphasis added. One cannot, therefore, say how the trial judge would have ruled under Section 1118.1 if he had correctly understood it at the time.

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[2]/ He also wrote at the same page, inconsistently, that plaintiff would not escape further punishment if she were "properly charged", apparently with manslaughter.

The prosecutor complains, last, that "a dismissal pursuant to Penal Code section 1385 does not resolve any factual elements of the crime, but reflects merely the court's conclusion that dismissal would be 'in the furtherance of justice.'" Return, page 21. This may be what state law provides, but if it is it is ineffective to deprive petitioner of her Fifth Amendment constitutional rights. Given the factual finding of insufficient evidence in the Order, its legal effect *under the Constitution* prevents a new prosecution.

Petitioner's counsel is commended for the high quality of his briefs.

THE MAGISTRATE JUDGE THEREFORE RECOMMENDS that an Order be issued by the Court (1) approving and adopting this Report and Recommendation, and (2) granting the petition for writ of habeas corpus forever prohibiting retrial of the petitioner on the three charges of murder which were dismissed by Judge Soares.

DATED: December 21, 1990.

VOLNEY V. BROWN, JR.
U.S. MAGISTRATE

VOLNEY V. BROWN, JR.
United States Magistrate Judge

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED: JANUARY 31, 1991

DIANE HELEN MANNES,	)	
	)	
Petitioner,	)	CASE NO. CV90-3297-AWT (B)
	)	
v.	)	FINAL REPORT AND
	)	RECOMMENDATION OF
JOHN V. GILLESPIE,	)	UNITED STATES
SHERIFF, et al.,	)	MAGISTRATE JUDGE
	)	
Respondents.	)	

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable A. Wallace Tashima, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

To the Report and Recommendation served and filed December 27, 1990, petitioner [sic] has filed his timely Objections. The Magistrate Judge has carefully read and considered these, but is unpersuaded to change his opinion. The trial judge *did* determine that the evidence was insufficient as a matter of law. Report and Recommendation, page 4. The trial judge *did* misinterpret P.C. 1118.1, applying the wrong standard. Report and Recommendation, page 5. The trial judge's erroneous comments as to refiling of the murder charges does *not* affect his finding that the evidence presented at the first trial was insufficient as a matter of law.

THE MAGISTRATE JUDGE THEREFORE FINALLY RECOMMENDS that an Order be issued by the Court (1) adopting and approving the Report and Recommendation, and (2) granting the petition for writ of habeas corpus forever prohibiting retrial of the petition [sic] on the three charges of murder which were dismissed by Judge Soares.

DATED: January 31, 1991.

/s/ Volney V. Brown, Jr.
VOLNEY V. BROWN, JR.
United States Magistrate Judge

APPENDIX K

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: FEBRUARY 7, 1991

DIANE HELEN MANNES,	
	NO. CV 90-3297 AWT (B)
Petitioner,	
	ORDER APPROVING
v.	MAGISTRATE JUDGE'S
	REPORT
JOHN V. GILLESPIE, SHERIFF, et al.,	
Respondents.	

Pursuant to 28 U.S.C. § 636(b)(1), the Court has reviewed all of the records and files herein, the Report and Recommendation of the United States Magistrate Judge (the initial Report), respondents' Objections to the initial Report and the Magistrate Judge's Final Report and Recommendation (the final Report). The Court has made a *de novo* determination of those portions of the initial Report to which objection has been made. The Court approves and adopts the initial Report. Accordingly,

IT IS ORDERED:

1. The Petition for Writ of Habeas Corpus is granted.

2. Judgment shall issue consistent herewith.

3. The Clerk shall serve this Order, the initial Report, the final Report and the Judgment herein on all counsel of record and the Clerk of the Superior Court for the County of Ventura.

Dated: FEB. 05, 1991

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: FEBRUARY 7, 1991

ENTERED: FEBRUARY 8, 1991

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

DIANE HELEN MANNES,	)
	)CASE NO. CV90-3297-AWT (B)
Petitioner,	)
	)JUDGMENT
v.	)
	)
JOHN V. GILLESPIE, SHERIFF,)	
et al.,	)
	)
Respondents.	)

Pursuant to the Order of the Court adopting and approving the Report of the United States Magistrate Judge,

IT IS ADJUDGED that petitioner is entitled to, and that this Judgment shall constitute a Writ of Habeas Corpus forever prohibiting the retrial of petitioner for the murder of Darrin Scott Mullins, Joshua Daniel Oxenreider and/or Jacob Eugene Boyd.

DATED: FEB. 05, 1991

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX M

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: FEBRUARY 20, 1991

DIANE HELEN MANNES,	)	
	)	
Petitioner,	)	NO. CV 90-3297 AWT(B)
	)	
v.	)	ORDER ON MOTION TO
	)	AMEND JUDGMENT
JOHN V. GILLESPIE,	)	
etc., et al.,	)	
	)	
Respondents.	)	

After judgment granting the writ of habeas corpus, respondent has moved to amend the judgment, pursuant to F. R. Civ. P. 52(b) and 59(e). Upon review of the motion, the court has determined that neither opposition nor oral argument would be helpful. The motion is now submitted for decision without oral argument. F. R. Civ. P. 78; Local Rule 7.11.

Although captioned a motion to "amend" the judgment, in fact, the relief requested is to vacate the judgment, *i.e.*, that "the writ be denied." The motion is a motion for reconsideration. *See* Local Rule 7.16. Two grounds are set forth: (1) A request for oral argument; and (2) Error of law.

Under applicable rules, the court is not required to hear oral argument. *See* F. R. Civ. P. 78; Local Rule 7.11. Moreover, nothing in the governing statutes requires that oral argument be permitted. *See* 28 U.S.C. §§ 636(b)(1) & 2254; *see also* F. R. Civ. P. 72(b).

With respect to the substance of the motion, it is nothing more than a reargument of the same position (supported by the same case citations) originally presented by respondent. Thus, this motion contravenes the rule that, "No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." Local Rule 7.16.

IT IS ORDERED:

1. The notice hearing date of March 11, 1991, is vacated.

2. The motion to amend judgment and for rehearing is DENIED.

DATED: FEB. 20, 1991

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX N

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CALIFORNIA PENAL CODE, SECTION 1118.1

In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right.

CALIFORNIA PENAL CODE, SECTION 1385

(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) **Motion After Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) **Same: conditional ruling on grant of motion.** If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.